IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. LINCOLN COLUMBUS BROWN, AKA LINKON COLUMBUS BROWN, Appellant, and DEBRA BOWERS, and each of them, Defendant.	)	No. 62968-9-I DIVISION ONE UNPUBLISHED OPINION FILED: April 5, 2010

Grosse, J. — Second degree prostitution is an alternative means crime. It may be committed by either advancing prostitution or profiting therefrom. Substantial evidence of each of the relied on alternatives must be present for a jury to convict on an alternative means crime such as second degree prostitution. Here, there is substantial evidence to support the defendant's conviction under both prongs. Accordingly, we affirm the judgment and sentence.

FACTS

In September 2006, Seattle police detectives began investigating prostitution advertisements posted on Craigslist, an online website. The

detectives discovered 30 to 40 advertisements offering prostitution services in the Maple Valley area. All of the advertisements contained a telephone number which was later connected to Lincoln Brown. Brown's co-defendant, later identified as Debra Bowers,[1] was called "Rhonda" in the advertisement. On October 30, 2006, an undercover detective called the telephone number and arranged a date with "Samantha," later identified as Lisa Ellis. Debra answered the telephone, identified herself as the scheduler, and asked how much the detective wanted to spend. He was then given directions to Brown's residence. A warrant was served on Brown's residence. In the master bedroom, detectives found clothing, Brown's identification, his business license for an escort service, a credit card machine, multiple condoms, sex toys, written agreements for many of the women in Brown's employ, and a notebook containing dates, names, sexual services, and dollar amounts. Brown contended that his activities were legal as he had a license for them and that the money paid was simply used to pay rent and bills for the house.

Almost a year later, detectives were monitoring Craigslist and noticed that Brown was again operating his business in King County. The detectives discovered advertisements for Ellis (now using the pseudonym "Porno Girl"), Rhonda, and "the Secretary." The Secretary was later identified as Denise Bowers, Debra's daughter.

On October 11, 2007, Detective Michael Klokow, acting in an undercover

[1] For the sake of clarity, we will refer to Debra and Denise Bowers by their first names.

capacity, called to arrange a date with "the Secretary." He made arrangements to meet her at 6:30 p.m. at the Red Lion Hotel in Tukwila. When Detective Klokow arrived at the hotel, he was met outside by Debra. Debra escorted him to room 102, which she opened with an access key card. Inside the room Debra asked him for the $200, the price that had previously been negotiated. She took the money from the detective and left the room as the Secretary emerged from the bathroom. The detective expressed concern about the money leaving but claimed he did not care as long as he could have sex. The Secretary then began to undress and exposed her genitalia to the detective. He called for the arrest team and identified himself as a police officer.

When Debra left room 102 with the $200, she entered room 108. Brown had rented both room 102 and 108. Brown answered the door when detectives knocked at room 108. Brown had the $200 buy money in his hand.

Hannah Beasley testified that she worked as a prostitute for Brown after this incident. She described her duties as providing company, time and sex acts for men. She testified that Brown ran the business, taking photos and placing advertisements for sex in a variety of media. Beasley also testified that Ellis, Denise, and Debra all worked as prostitutes for the defendant. She testified that the normal course of business was for another person to take the money from the client and give it to Brown. Brown did not give any money back to the girls, but provided them with a place to live, food, clothing, and crack cocaine.

Co-defendant Debra Bowers also testified and admitted that she was a

prostitute working for Brown. Her testimony corroborated Beasley's. Debra testified that the money went to Brown, she never received any of it, but Brown would provide her with drugs daily and she could stay in his house. Additionally, Debra testified that the Red Lion Hotel rooms were rented for the entire weekend for purposes of prostitution. She admitted taking the money from the undercover detective in room 102, that the money was for sex, and that she gave the money to Brown in room 108.

Brown testified on his own behalf and admitted that he marketed the women, but claimed that they were independent. He claimed that any money he received was going into the business and nothing to his individual account. He claimed that Denise was not working for him although he admitted to posting the advertisements for both Debra and Denise. He claimed that Denise had come to visit her mother and needed a room.

He admitted that Debra gave the $200 buy money to him, but claimed it was just to pay for the room. Together both rooms cost a total of $155. Brown asserted that none of the money was going to him and that he was unaware of what Denise was doing in the other room. He testified that the women who worked for him had rules and were not permitted to do "sexual acts." He asserted that he ran a legal, licensed, escort agency and that his employees did not perform sexual acts.

A jury convicted Brown of promoting prostitution in the second degree in violation of RCW 9A.88.080(1)(b).[2]

[2] RCW 9A.88.080 provides:

ANALYSIS

Sufficiency of Evidence

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.[3] A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it.[4] Circumstantial evidence is considered as reliable as direct evidence.[5] Credibility determinations are for the trier of fact and are not subject to review.[6]

Brown was convicted of second degree prostitution. Second degree prostitution is an alternative means crime which provides that the proscribed criminal conduct may be accomplished by more than one means of committing that crime.[7] If a single offense may be committed in more than one way, as here, the jury must be unanimous as to the guilt for the single crime charged and substantial evidence of each of the relied-on alternatives must be present.[8] Thus, courts have held that a unanimity instruction is not needed, as long as

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(1) A person is guilty of promoting prostitution in the second degree if he knowingly:
(a) Profits from prostitution; or
(b) Advances prostitution.

[3] State v. Hosier, 157 Wn.2d 1, 8, 936 P.3d 1358 (2006).
[4] State v. Sanchez, 60 Wn. App. 687, 693, 806 P.2d 782 (1991).
[5] State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).
[6] State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).
[7] State v. Doogan, 82 Wn. App. 185, 187-88, 917 P.2d 155 (1996).
[8] State v. Smith, 159 Wn.2d 778, 783, 155 P.3d 873 (2007) (citing State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988)).

there is substantial evidence to support each means charged.[9]

Brown argues that the State only proved that he advanced prostitution, but that there was insufficient evidence to prove that he profited from the prostitution. RCW 9A.88.060 defines the term "[p]rofits from prostitution" as

> [a] person "profits from prostitution" if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he accepts or receives money or other property pursuant to an agreement or understanding with any person whereby he participates or is to participate in the proceeds of prostitution activity.

Here, the evidence clearly demonstrated that the $200 paid for the act of prostitution was given to the defendant. It was Brown who was arrested with the $200 in his hands. Debra testified that the buy money was not for his benefit but rather to pay for the hotel bill. This is a factual argument that the jury resolved against him. Issues of credibility are for the jury to decide.[10] There is substantial evidence to support the jury's decision.

Detective Klokow's Testimony

Brown contends that he was denied his constitutional right to confrontation when Detective Klokow testified about Denise's conduct in the hotel room. He maintains that the evidence amounted to "nonverbal statements" that Denise was offering sex for money and as such violated his Sixth Amendment right to confrontation under Crawford v. Washington.[11]

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[9] State v. Arndt, 87 Wn.2d 374, 377, 553 P.2d 1328 (1976).
[10] Camarillo, 115 Wn.2d at 71.
[11] 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (declarant's testimonial hearsay statements inadmissible unless declarant unavailable and defendant had a prior opportunity for cross-examination).

The State argues that Brown failed to preserve this issue for appeal since the evidentiary issue raised was not objected to during trial. But counsel raised the issue in limine and moved to exclude Detective Klokow's testimony about Denise's conduct in the hotel room. The trial court ruled that the detective's testimony regarding Denise's conduct was not testimonial as it did not amount to an assertion and was therefore admissible. As noted by the Supreme Court in State v. Powell, "the purpose of a motion in limine is to avoid the requirement that counsel object to contested evidence when it is offered during trial, [and] the losing party is deemed to have a standing objection where a judge has made a final ruling on the motion."[12] The trial court's ruling on the nonverbal conduct was a final ruling. The issue has been preserved for appeal.

In general, hearsay is an out-of-court "statement" offered to prove the truth of the matter asserted.[13] For purposes of the rules of evidence, "[a] 'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."[14] "Assertion is not defined by the rule, but the advisory committee's note to subdivision (a) of Fed. R. Evid. 801, to which the Washington rule defers, provides that 'nothing is an assertion unless intended to be one.'"[15]

Under certain circumstances, nonverbal conduct may constitute hearsay and implicate a defendant's constitutional right to confrontation. But in this case,

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[12] 126 Wn.2d 244, 256, 893 P.2d 615 (1995).
[13] ER 801(c).
[14] ER 801(a).
[15] State v. Collins, 76 Wn. App. 496, 498, 886 P.2d 243 (1995).

the detective's testimony regarding the actions taken by Denise in the hotel room is not an assertion, but a mere recounting of the events that unfolded before him.

DNA Collection Fee

In 2002, the legislature enacted a statute requiring the imposition of a $100 DNA (deoxyribonucleic acid) collection fee, but gave court discretion to waive the fee if it would result in "undue hardship on the offender."[16] In 2008, the legislature passed an amendment to the 2002 statute requiring courts to impose a $100 DNA collection fee. Brown's offense was committed prior to the enactment of that amendment.[17] Brown argues that applying the mandatory fee provision in effect at the time of sentencing violates the savings statute[18] and the ex post facto clause.[19] We disagree.

We recently addressed these precise arguments in State v Brewster[20] and State v. Thompson[21] and rejected them. Concluding that the DNA collection fee is not punitive, we held that neither the savings statute nor the ex post facto clause applies to the mandatory DNA fee provision.[22] Defense counsel's failure to object to the trial court's proper inclusion of the mandatory DNA fee in Brown's sentence was thus not deficient.

Finally, there is no need to remand to the trial court for findings of fact and conclusions of law relating to the pretrial CrR 3.5 and CrR 3.6 hearings as they have now been entered. Brown does not assert that he is prejudiced by the delayed entry of those findings.

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[16] Former RCW 43.43.7541 (2002).
[17] RCW 43.43.7541 (amended by Laws of 2008, ch. 97, § 3).
[18] RCW 10.01.040.
[19] U.S. Const. art. I, § 10; Wash. Const. art. I, § 23.
[20] 152 Wn. App. 856, 218 P.3d 249 (2009).
[21] 153 Wn. App. 325, 223 P.3d 1165 (2009).
[22] 153 Wn. App. at 336-37.

Statement of Additional Grounds

In a pro se statement of additional grounds, Brown also contends that he received ineffective assistance of counsel and was denied a speedy trial. We disagree.

"To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice."[23] Counsel's representation is presumed to have been reasonable, and all significant decisions by counsel are presumed to be an exercise of reasonable professional judgment.[24]

Brown asserts that his counsel was ineffective because he failed to call certain witnesses, to impeach certain witnesses, to introduce particular evidence, and to object to certain testimony. Brown also contends his counsel's closing argument was ineffective. None of these allegations are supported by the record we have before us. Decisions on whether or not to examine or call witnesses are tactical.[25] Likewise, the "opening statement and closing argument fall within the purview of tactical judgments and are not to be second-guessed by this court."[26] We cannot determine from the record that any of the witnesses who were not called would have been helpful to the defense.

Brown also argues that the trial court violated his right to a speedy trial. A trial court's decision to grant a continuance under CrR 3.3 will not be disturbed

[23] State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).
[24] State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).
[25] State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262 (1983).
[26] State v. Lord, 117 Wn.2d 829, 885, 822 P.2d 177 (1991).

absent a showing of manifest abuse of discretion. Brown's argument is conclusory and no prejudice is shown. We cannot tell from the record anything regarding the continuances. Indeed, his argument in his statement of additional grounds states that it was "agreed and understood that this granting of exten[sion] would not be harmful or prejudice[ial] to the defense." His complaint is really addressed to the trial's result.

The trial court is affirmed.

Grosse, J.

WE CONCUR:

Leach, J.

Becker, J.